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No. 81-2331

IN THE

Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, et al.

and

UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS COUNCIL, ET AL.

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COUNTER-STATEMENT OF PETITIONERS' QUESTIONS

1. Whether the district court abused its discretion in denying the defendants' motion to modify the consent decree.

2. Whether the district court abused its discretion in declaring the defendants to be in violation of the consent decree.

3. Whether the district court's denial of an evidentiary hearing was in conflict with *Hughes v. United States*, 342 U. S. 353 (1952).

4. Whether the district court abused its discretion in requiring defendants to certify a minimum of 3,000 inspection stations.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF PETITIONERS' QUESTIONS	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	7
Summary	7
I. The Court Did Not Abuse Its Discretion in Denying Defendants' Motion to Modify the Consent Decree	7
II. The Court Did Not Abuse Its Discretion in Declaring Defendants to Be in Violation of the Consent Decree	11
III. The Court's Procedures Did Not Conflict With the Supreme Court Holding in *Hughes v. United States*, 342 U. S. 353 (1952)	12
A. Monthly On-Site Audits	14
B. Independent Referee Stations	14
IV. The Court Did Not Abuse Its Discretion in Requiring Defendants to Certify a Minimum of 3,000 I/M Stations	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Commonwealth of Pennsylvania v. Environmental Protection Agency, 500 F. 2d 246 (3rd Cir. 1974) 2

Girard Trust Bank v. Martin, 477 F. 2d 386 (3rd Cir. 1977), *cert. den.*, 434 U. S. 985 (1977) 8

Hughes v. United States, 342 U. S. 353 (1952) .....i, 7, 12, 13, 14, 15, 18

International Bhd of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n, 660 F. 2d 76 (3rd Cir. 1981) 8

Mayberry v. Maroney (I), 529 F. 2d 332 (3rd Cir. 1976) ... 8, 11

Mayberry v. Maroney (II), 558 F. 2d 1159 (3rd Cir. 1977) . 8

McComb v. Jacksonville Paper Co., 336 U. S. 187 (1949) ... 11

Philadelphia Welfare Rights Org. v. Shapp, 602 F. 2d 1114 (3rd Cir. 1979), *cert. den.*, 444 U. S. 1026 (1980) 8

System Federation No. 91 Ry. Employee's Department, AFL-CIO v. Wright, 364 U. S. 642 (1961) 7, 8

United States v. Swift & Co., 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999 (1932) 7, 8

United States v. United Foam Corporation, 565 F. 2d 563 (9th Cir. 1977) 13

Statutes and Regulations:

Clean Air Act of 1970, 42 U. S. C. § 1857, et seq. 2

Clean Air Act Amendments of 1977, 42 U. S. C. § 7401, et seq. 2

House Bill 456 Act 99, 10/5/81, 71 P. S. 523 6

9 Pa. Bull. 4193 (12/12/79), sections 177.35(b) and (c) 4

38 Fed. Reg. 32884 (11/28/73) 2

40 CFR 52.2037, et seq. 2

40 CFR 52.2038 2

40 CFR 52.2038(d)(6) 2

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BRIEF IN OPPOSITION OF DELAWARE VALLEY CITIZENS COUNCIL, et al.

Respondents, the Delaware Valley Citizens Council for Clean Air, et al. respectfully request the Court to deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit reported at 674 F. 2d 976 (3rd Cir., March 1, 1982). The defendants' petition for rehearing was denied March 26, 1982.

COUNTER-STATEMENT OF THE CASE

In accord with the provisions of the Clean Air Act of 1970[1] the defendants submitted a State Implementation Plan (SIP) for attaining compliance with the national ambient air quality standards, 42 U. S. C. § 7410. The defendants' proposed SIP for attaining compliance with the standards for carbon monoxide and ozone voluntarily included a Transportation Control Plan which would reduce emissions of carbon monoxide and ozone-forming hydrocarbons from mobile pollution sources and, as part of this Transportation Control Plan, the defendants opted to implement an auto emission inspection and maintenance (I/M) program).[2]

On the basis of defendants' proposed SIP the Administrator of the United States Environmental Protection Agency ("EPA") promulgated the Pennsylvania SIP in 38 Fed. Reg. 32884 (11/28/73), 40 CFR 52.2037, et seq. The promulgated SIP included an I/M program, somewhat revised from the defendants' proposal, 40 CFR 52.2038 and established May 1, 1975 as the date for I/M program implementation, 40 CFR 52.2038(d)(6).[3]

In June 1976, more than one year after the I/M program had been scheduled to start, the state had not yet

1. When enacted in 1970 the Clean Air Act was codified at 42 U. S. C. § 1857, et seq. With passage of the 1977 Amendments the Act was recodified at 42 U. S. C. § 7401, et seq. All references to the Clean Air Act are based on the post 1977 recodification.

2. Under the Clean Air Act of 1970 the inclusion of an I/M program in a state SIP was optional with the state. Under the Clean Air Act Amendments of 1977 the inclusion of an I/M program was mandatory for Pennsylvania and other states which could not attain carbon monoxide or ozone standards by December 31, 1982.

3. Pennsylvania petitioned for review of some aspects of the EPA promulgated SIP but did not seek review of the I/M program requirement or the I/M implementation date. *Commonwealth of Pennsylvania v. Environmental Protection Agency*, 500 F. 2d 246 (3rd Cir. 1974).

undertaken to implement the I/M program nor had the EPA taken any action to enforce the obligation. Accordingly the Delaware Valley Citizens Council for Clean Air, et al. ("Delaware Valley") filed an action against the EPA for failure to enforce the I/M program requirement and against the state defendants (the Commonwealth of Pennsylvania, the Pennsylvania Secretary of Environmental Resources and the Pennsylvania Secretary of Transportation) for violation of the I/M program requirement in the state SIP. Subsequently, the EPA decided to bring an enforcement action against the state defendants and the two actions were consolidated.

Following lengthy discovery and negotiations the parties concluded a consent agreement which was endorsed by the court on August 30, 1978. (App. 46a).[4] Under this Consent Decree the defendants were required to implement the I/M program by August 1, 1980. Subsequently, at the request of the defendants, the parties and the court (on March 7, 1980) agreed to a Consent Decree modification which delayed the I/M implementation until May 1, 1981. (App. 67a).

The Consent Decree allowed the state the option of using state controlled (franchise) inspection stations or of using individual private garage inspection stations to inspect automobile exhaust emissions. Consent Decree, para. 4. (App. 51a). The defendants opted for the private garage system.[5] Under this system each private garage desiring to participate in the I/M program must obtain an auto exhaust emission analyzer which meets specifications promulgated by the defendants.

As of February 6, 1981, less than three months before the I/M program was scheduled to start, the defendants had still not promulgated all the regulations necessary

4. Appendix references are to the appendix attached to Petitioners' Brief.

5. The state has successfully operated a private garage system for its automobile safety inspection program.

for establishing or implementing the I/M program. Most notable among these omissions was their failure to publish specifications for the emission analyzers or to publish a list of approved emission analyzers. See 9 Pa. Bull. 4193 (12/12/79), sections 177.35(b) and (c). Without these regulations the private garage owners who desired to participate in the I/M program could not place orders for emission analyzers and thus the I/M program could not be implemented.

On February 6, 1981 the defendants requested Delaware Valley and EPA to support another Consent Decree modification under which the start of the I/M program would be changed from May 1, 1981 to January 1, 1983, a change of 20 months. The defendants claimed their reason for requesting the modification was their desire to conform to an EPA suggestion that states use "computer analyzer" emission testers. The EPA suggestion did not require states to use the "computer analyzer", and EPA advised that the analyzers would be more expensive than other types of acceptable analyzers. Investigation also revealed that the "computer analyzers" had not yet been manufactured, not even in prototype, and that there was no assurance that they would be available in time for January 1, 1983 implementation.

The parties entered into negotiations on the defendants' request for modification but both Delaware Valley (on February 12, 1981) and the EPA plaintiffs (on February 13, 1981) informed the defendants in writing that they expected defendants to comply with the Consent Decree notwithstanding negotiations.

Negotiations broke down on April 28, 1981 when Delaware Valley concluded that the defendants' purpose in seeking the modification was really for the purpose of obtaining more time to attempt to avoid the I/M program entirely. Delaware Valley's conclusion was confirmed shortly thereafter when Pennsylvania Governor Dick Thornburgh wrote to the General Assembly, on July 10, 1981, as follows:

> "My administration is fighting the precipitous implementation of this [I/M] program through the courts. At the same time, we are actively supporting efforts in the Congress to abolish the program and to prevent the loss of federal funds to states which decline to implement it."

It is also important to note that as late as July 19, 1982 no manufacturer has produced, even in prototype, the "computer analyzer" emission testers which defendants wished to specify.

On April 29, 1981 the defendants moved the court for a 20 month delay in I/M implementation. In turn, Delaware Valley, on May 1, moved to declare the defendants in violation of the Consent Decree. The court heard oral arguments on both motions on May 6. At the close of the hearing the district court directed EPA to submit a report on the quality of the air in the geographical areas affected by the lawsuit (the greater Philadelphia and Pittsburgh areas).

On May 20, following receipt of the EPA air quality report, the court issued a memorandum and order (App. 1a) which, inter alia, denied the defendants' motion for modification and declared the defendants to be in violation of the Consent Decree.

The May 20 court order also directed the defendants to submit, by June 1, a proposed plan for the "*immediate* implementation of the I/M program in accordance with the consent decree." (Emphasis in original). (App. 5a). On June 8 Delaware Valley and EPA submitted comments on the proposals and all parties presented oral arguments on the plans and comments on June 10.

The district court, on June 16, issued a comprehensive memorandum and order (App. 6a) setting new schedules for the establishment of the I/M program and clarifying various aspects of the Consent Decree in order to avoid further delay in implementing the program. The court

order accepted the defendants' selection of an emission analyzer (an analyzer that was already being manufactured) and established May 1, 1982 as the new date for I/M implementation. By way of I/M program clarification the June 16 court order required the defendants to establish monthly on-site audits of the participating inspection stations and to establish two independent referee stations for consumer protection. (App. 14a). The court order also provided that the defendants "certify a minimum of 3,000 inspection stations in order to effectively implement this program." (App. 15a).

The Court of Appeals for the Third Circuit heard oral argument on defendants' appeals of the district court orders of May 20 and June 16, 1981 and affirmed in all respects. 674 F. 2d 976 (3rd Cir., March 1, 1982). (App. 17a). The petition for a writ seeks this Court's review of that judgment.

While the parties have been engaged in legal battles before the courts, the Pennsylvania General Assembly has also been engaged in activity vitally affecting the I/M program. On October 5, 1981 the legislature, over the veto of Governor Thornburgh, adopted House Bill 456 Act 99, 10/5/81, 71 P. S. 523) which prohibits the expenditure of public funds to establish or administer the I/M program. As a consequence of House Bill 456 the defendants completely ceased all activity on the I/M program and, in consequence, were declared to be in civil contempt. No. 76-2068, E. D. Pa., 1/22/82. By way of a civil contempt sanction the district court enjoined the United States Secretary of Transportation from making certain grants of federal highway aid to the Commonwealth of Pennsylvania. The court of appeals has confirmed the finding of civil contempt and the civil contempt sanction. No. 82-1104, 3rd Cir., 5/21/82. That judgment is *not* the subject of the present petition.

REASONS FOR DENYING THE WRIT

Summary

It is generally recognized that a writ of certiorari will not be granted unless "there are special and important reasons therefor." Rule 17.1, United States Supreme Court Rules. Respondents, Delaware Valley, contend that the questions presented by petitioners cannot be characterized as either special or important because the court of appeals rendered no opinion in conflict with another federal court of appeals nor did it depart from the accepted and usual course of judicial proceedings.

The questions presented by the petitioners essentially concern matters of district court judicial discretion in the administration of a consent decree. The court of appeals has ruled unanimously that the district court did not abuse its discretion in any respect. The petitioners now seek this Court's determination of whether the district court abused its judicial discretion in administering the Consent Decree.

Petitioners question whether the district court procedures conflict with the requirements established in *Hughes v. United States*, 342 U. S. 353 (1952). *Hughes* requires a court to afford an affected party an evidentiary hearing before modifying a consent decree to impose an additional burden on the party; but the district court, in the case at bar, merely ordered defendants to meet requirements that were explicit or implicit in the existing consent decree and therefore no evidentiary hearing was required.

I. The Court Did Not Abuse Its Discretion in Denying Defendants' Motion to Modify the Consent Decree

It is well established that district courts have the authority to modify a judgment or consent decree. *United States v. Swift & Co.*, 286 U. S. 106, 114-15 (1932). Motions to modify consent decrees are addressed to the sound discretion of the court, *System Federation No. 91 Ry. Employee's Department, AFL-CIO v. Wright*, 364 U. S. 642,

646-47 (1961) and therefore are not to be disturbed except for an abuse of that discretion. *Girard Trust Bank v. Martin*, 477 F. 2d 386 (3rd Cir. 1977), *cert. den.*, 434 U. S. 985 (1977).

The modification of a judgment or consent decree "may be granted only upon a showing of exceptional circumstances", *Philadelphia Welfare Rights Org. v. Shapp*, 602 F. 2d 1114, 1119-20 (3rd Cir. 1979), *cert. den.*, 444 U. S. 1026 (1980); because there is "an overriding interest in the finality of judgments", *Mayberry v. Maroney (I)*, 529 F. 2d 332, 337 (3rd Cir. 1976), especially in cases where the parties made free and calculated choices to submit to a consent decree. *Philadelphia Welfare Rights Org. v. Shapp*, 602 F. 2d 1114, 1120 (3rd Cir. 1979). For these reasons the party seeking to modify a decree:

> "must bear a heavy burden of showing circumstances so changed that 'dangers once substantial, have become attenuated to a shadow,' *United States v. Swift & Co.*, 286 U. S. 106, 119, 52 S. Ct. 460, 464, 76 L. Ed. 999 (1932), and that absent such relief an 'extreme' and 'unexpected' hardship will result."

Mayberry v. Maroney (II), 558 F. 2d 1159, 1163 (3rd Cir. 1977), *International Bhd of Teamsters, Local 249 v. Western Pa. Motor Carriers Ass'n*, 660 F. 2d 76, 85 (3rd Cir. 1981).

On April 29, 1981, just two days before defendants were scheduled to implement the I/M program they moved in district court for a Consent Decree modification which would delay implementation some 20 months. The sole reason advanced for this motion was the defendants' desire to comply with the EPA suggestion to use "computer analyzer" emission testers for the I/M program.

Though EPA suggested the use of "computer analyzers", EPA made clear that other emission testers were acceptable and could be used in the I/M program. Among the drawbacks to the "computer analyzers" was their

higher cost and, most importantly, the fact that none had ever been manufactured, not even in prototype. It was for this latter reason that EPA suggested that states which use "computer analyzers" be given until January 1, 1983 to implement the I/M program.

Delaware Valley opposed the defendants' motion because negotiations failed to convince them that the proposed change would be of sufficient benefit to warrant a 20 month I/M program delay and because defendants could not assure the availability of the "computer analyzer" emission testers nor assure Delaware Valley that they intended to implement the I/M program after the delay.

On May 6 the parties presented oral argument on the motion. Defendants made no argument that extreme or unexpected hardships would result if they were required to comply with the consent decree, nor did the defendants present any argument that the pollution problem had become "attenuated to a shadow".

In fact, it was the district court which requested a report from EPA to determine the extent of air pollution in the areas of Pennsylvania affected by the lawsuit.

On May 20, after receiving the EPA air quality report, the court issued a memorandum and order in which it noted:

> "The report demonstrates that, while air quality in the two regions is improving or presently adequate in respect to some EPA standards, it continues to be wholly inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only fails to meet the standard, but has become worse over the past two years. In the Philadelphia area, the ozone level, while decreasing, is still at nearly twice the concentration permitted by the EPA standard. . . ."

(App. 3a). It was, therefore, not unreasonable for the court to deny the defendants' motion. The court explained:

> "The new computer analyzer, which is more expensive, is not now available and though presumably more ac-

> curate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the [EPA]. All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program."

District Court Memorandum and Order, May 20, 1981. (App. 2a).

Petitioners contend that the refusal of the district court to comply with the EPA suggestion about using "computer analyzers" constitutes an abuse of judicial discretion. (Pet. Br., p. 13). There is no basis in law for such a legal conclusion and defendants offer no legal support for the conclusion.

Modifications of consent decrees are addressed to the sound discretion of the court, not to the discretion of an administrative agency. Though administrative agency policy warrants the court's most careful consideration such policy pronouncements cannot replace the authority of the court. A per se rule of judicial abuse of discretion, such as defendants propose, would result in administrative agency usurpation of judicial power.

The courts below gave careful consideration to the EPA policy but found it unpersuasive in the light of all the circumstances: the fact that defendants already were 6 years behind schedule; that air pollution remained high; that defendants could not assure the availability of "computer analyzers"; and that test equipment was presently available which could serve the purpose and was satisfactory to the EPA.

The district court's denial of defendants' motion was exhaustively reviewed by the court of appeals (App. 30a-34a) and the appellate court ruled that there had been no abuse of judicial discretion. Petitioners raise no question in respect to this issue which warrants review by the Supreme Court.

II. The Court Did Not Abuse Its Discretion in Declaring Defendants to Be in Violation of the Consent Decree

It is uncontroverted that the defendants did not implement the I/M program on May 1, 1981 nor did they complete the regulatory process required for all aspects of the I/M program. It therefore follows that the defendants violated their obligations under the Consent Decree and should be declared in violation if the court below did not abuse its discretion in denying defendants' motion for a 20 month delay.

Defendants contend they should not be held in violation of the Consent Decree because they were operating in good faith to comply with the EPA suggestion and because Delaware Valley was unreasonable in refusing defendants' request for the 20 month delay.

Regardless of whether defendants have operated in good faith, the absence of willfulness does not relieve a party of its obligations under a consent decree. *McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 191 (1949). Until a court approves a modification a party is obliged to comply with its responsibilities and may not disregard the terms of the existing decree. *Mayberry v. Maroney (I)*, 529 F. 2d 332, 336 (3rd Cir. 1976).

For its part, Delaware Valley had no obligation to agree to a decree modification which it believed to be antithetical to its interests. Defendants suggest, however, that they be relieved of their Consent Decree violations because Delaware Valley refused to accede to their request. Such a concept stands the law on its head; it would relieve all obligors of their duties whenever the obligees did not voluntarily relinquish their claim.

The defendants were obligated to implement the I/M program by May 1, 1981; they did not do so and the court denied their motion to delay the implementation date. The court of appeals found no abuse of judicial discretion by the district court in ruling the defendants to be in violation of the Consent Decree. Petitioners raise no ques-

tion in respect to this issue which warrants review by the Supreme Court.

III. The Court Procedures Did Not Conflict With the Supreme Court Holding in *Hughes v. United States*, 342 U. S. 353 (1952)

The defendants' failure to implement the I/M program and their failure to promulgate the necessary I/M program regulations required the district court to establish new schedules and to clarify the consent decree to avoid further program delays. The court directed defendants to submit a proposed plan for "immediate implementation" of the I/M program (App. 5a) and Delaware Valley and EPA were invited to submit their comments thereon. (App. 5a).

On June 10, 1981 the district court heard oral arguments on the plans and comments and the court, on June 16, issued a comprehensive order designed to expedite the I/M program. The court approved the BAR-80-ADC emission analyzer test equipment (test equipment already in manufacture) and established May 1, 1982 as the new implementation date. Both of these orders were based on defendants' proposals.

By way of clarifying the defendants' responsibilities under the Consent Decree the court ordered the defendants: (a) to establish a system for monthly on-site audits of participating private garage inspection stations (App. 14a); and (b) to establish at least 2 independent referee stations for consumer protection. (App. 14a).

Additionally the district court ordered the defendants to certify a minimum of 3,000 private garage inspection stations to effectively implement the I/M program. (App. 15a).

Defendants allege that the requirements for monthly on-site audits, for independent consumer protection referee stations, and for the certification of at least 3,000 inspection stations are all substantial modifications of the

Consent Decree and impose additional obligations on the defendants. For this reason the defendants allege the district court erred in not affording them an evidentiary hearing. (Pet. Br., pp. 8, 9).

Hughes v. United States, 342 U. S. 353 (1952) requires a court to provide an evidentiary hearing to an affected party before it may substantially modify a consent decree to impose additional responsibilities on that party. 342 U. S. at 357. See also, *United States v. United Foam Corporation*, 565 F. 2d 563, 566 (9th Cir. 1977). *Hughes*, however, does not require an evidentiary hearing where a court merely construes an existing decree; or where the court denies a motion to modify the decree; or where the modification is not substantial in nature.

In *Hughes*, the Supreme Court held that the district court should have afforded defendant Hughes an evidentiary hearing before ordering the sale of Hughes stock by the trustee because such a divestment order constituted a substantial modification of the consent decree and there was "no fair support" for such an obligation in the "language" of the consent decree. 342 U. S. at 357.

In contrast to the district court order involved in *Hughes*, the requirements of the June 16 court order are either explicitly or implicitly contained in the Consent Decree; none can rightly be considered to modify the Consent Decree and none impose any additional obligation on the defendants. The district court's omission of evidentiary hearings on these requirements, therefore, do not conflict with the procedural protections guaranteed by *Hughes*.

In subsections III(A) and III(B) respondents demonstrate that the requirement for monthly audits and for referee stations, respectively, are explicit requirements of the Consent Decree and therefore did not require the court to grant defendants an evidentiary hearing. In section IV respondents demonstrate that the requirement to certify 3,000 private garage inspection stations is implicit in the Consent Decree and imposes no additional obligation on the defendants. Additionally respondents show that no

factual controversy exists regarding the 3,000 garage certifications and, therefore, that no evidentiary hearing is required in any case.

A. Monthly On-Site Audits

There can be no question that the Consent Decree existing prior to the June 16, 1981 court order explicitly provided for monthly on-site audits of the I/M inspection stations. Thus: the Consent Decree modification approved by the court on March 7, 1980 (App. 67a) specifies that "the quality control procedures [be] as effective as the results of monthly on-site visits by the Commonwealth to inspect facilities, check instrument calibrations and inspect records." Consent Decree Mod., Sched. B., para. 4. (App. 70a). And the Consent Decree modification also provided that "Plaintiffs reserve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth." Consent Decree Mod., Sched. B., par. 8. (App. 71a).

By specifying that the defendants establish a monthly on-site audit system the June 16 court order did not impose a new obligation on the defendants nor did it enlarge on the obligations already required by the Consent Decree. The district court, therefore, was not required to afford the defendants an evidentiary hearing. It was the defendants who sought to modify the Consent Decree by substituting quarterly on-site audits for monthly on-site visits. (App. 37a). The denial of such a modification request does not require an evidentiary hearing and therefore it cannot be said that the district court acted contrary to *Hughes*.

B. Independent Referee Stations

The requirement that defendants provide at least two independent referee confirming inspection stations for consumer protection was also explicit in the Consent Decree which existed prior to the court order of June 16, 1981. Thus, the Consent Decree modification approved by the

court March 7, 1980 (App. 67a) required the defendants establish at least two "facilities where official confirming inspections may be conducted independent of certified private garages. . . ." Consent Decree Mod., Sched. B, para. 9. (App. 71a, 72a).

The June 16, 1981 court order specifying that defendants establish at least two referee stations, therefore, does not impose any new obligation nor enlarge on any previous obligation in respect to referee stations. Therefore, the district court was not required to afford the defendants an evidentiary hearing on this matter. Here again, it was the defendants who wished to modify the existing Consent Decree by substituting a central complaint office for the two referee stations. The denial of this request for Consent Decree modification does not require the court to provide an evidentiary hearing and therefore the district court did not act in conflict with *Hughes*.

IV. The Court Did Not Abuse Its Discretion in Requiring Defendants to Certify a Minimum of 3,000 I/M Stations

The defendants contend that the district court order of June 16, 1981 requiring defendants to certify a minimum of 3,000 inspection stations (App. 8a, 15a) to establish an effective I/M program was in error in two respects. According to the defendants, this requirement should not have been imposed because defendants had not been afforded an evidentiary hearing (Pet. Br., p. 9) and because the requirement intrudes "into the doctrines of separation of powers and federalism." (Pet. Br., p. 12).

Defendants argue that the Consent Decree did not specify any minimum number of inspection stations and, therefore, the requirement to certify 3,000 stations is a modification adding to their obligations. They do not argue, however, that at least 3,000 stations are required to establish an effective I/M program because they have admitted that they need 8,700 stations to make for an

effective program. (App. 40a). Defendants' underlying argument is that the Consent Decree does not impose any enforceable obligation on them. (See transcript of dialogue at court of appeals hearing, App. 41a, fn. 14). Therefore, say the defendants, if the court specifies any number of certified stations it represents a greater obligation than the Consent Decree and they should be afforded an evidentiary hearing.

Assuming, arguendo, that the district court and the court of appeals are correct in construing the consent decree to require the defendants to implement an effective I/M program there would be an implicit requirement that defendants certify at least as many inspection stations as would be necessary to make for an effective program. Since defendants admit that 8,700 stations may be needed for the program they cannot claim that the June 16 order for 3,000 stations is a greater obligation on the defendants than was implicit in the Consent Decree obligation. It follows, therefore, that if the Consent Decree does obligate the defendants to implement an effective I/M program there is no need for an evidentiary hearing for there are no material facts in dispute.

The court of appeals rejected the defendants' contention that the Consent Decree imposed no obligation on them to effectively implement the I/M program. Said the court of appeals: "Such an argument would make a mockery of the Consent Decree and would work a cruel hoax on the court." (App. 42a).

In respect to the defendants' argument that they could not compel private garages to participate in the program and that therefore they should not be required to certify *even one* inspection station (App. 40a) the circuit court declared:

> "It was always contemplated that the I/M program would be structured such that there would be an economic incentive for private garages to participate . . . .

"We have no reason to believe that if the Commonwealth set about implementing the I/M program in good faith, the goal of 3,000 certified stations could not be met. But even if the number of initially volunteering garages fell short of the number necessary to operate the I/M program adequately, this would not be grounds—as the Commonwealth seems to suggest—for scrapping the decree. The Commonwealth always retains the option to establish its own inspection stations if a shortage of inspection facilities develop . . . ." (App. 42a, 43a).

Anxious to find judicial error wherever they can, defendants allege that the cited paragraph from the court of appeals opinion constitutes a "major and devastating error" (Pet. Br., p. 11) because, say the defendants "there is no authority in any state law which permits the Department [of Transportation] to establish state inspection stations." (Pet. Br., p. 12).

The petitioners make much ado about nothing. Clearly the court of appeals did not order the defendants to establish any state inspection stations and neither did the district court. Both the district court and court of appeals have expressed confidence that with good faith the defendants will be able to structure a program with economic incentives to induce the requisite number of private garages to participate, just as the defendants have successfully done for many years for the state's auto safety inspection program.

The court of appeals' suggestion of possible future *voluntary* action by the defendants to deal with a possible future contingency cannot be interpreted as a federal court order intruding on state prerogatives.

In establishing the requirement for state certification of 3,000 I/M stations the court provided an objective basis for evaluating the defendants' progress in establishing the I/M program. Without such an objective criteria the

court's problem in attempting to administer and expedite the Consent Decree will be far more difficult.

The Consent Decree obligates the defendants to implement an effective I/M program. Implicit in this obligation is the defendants' obligation to induce at least 3,000 garages to participate in the program. It therefore follows that the court did not impose a new obligation on the defendants and therefore that the court's omission of an evidentiary hearing did not conflict with the procedural protections in *Hughes*.

CONCLUSION

For the foregoing reasons Respondents, Delaware Valley, respectfully request that this Court deny the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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